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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 937

DIANA K. POWELL, *Petitioner*

v.

THE WASHINGTON POST COMPANY, and JAMES P. MITCHELL, Secretary of Labor for the United States, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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DIANA K. POWELL, *Petitioner*

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THE WASHINGTON POST COMPANY, and JAMES P. MITCHELL, Secretary of Labor for the United States, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above cause on April 23, 1959.

OPINIONS BELOW

The Memorandum Opinion of the United States District Court for the District of Columbia, entered October 1, 1958, is unofficially reported at 35 CCH Lab. Cas. ¶71,833; 27 LW 2197, and is set forth in the Appendix hereto at page 1a. The Opinion of the United States Court of Appeals for the District of Columbia Circuit, entered April 23, 1959, is reported at 87 WLR 423 (April 27, 1959), and is set forth in the Appendix hereto at page 4a.

JURISDICTION

The Judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed was entered on April 23, 1959, and is set forth in the Appendix hereto at page 6a.

The jurisdiction of this Court is invoked under the Revised Judicial Code, 28 U.S.C.A. 1254(1), providing for review of a judgment of a United States Court of Appeals by writ of certiorari granted upon the petition of a party to the case.

QUESTIONS PRESENTED

The question presented is whether an employee wrongfully discharged for reporting overtime violations of the Fair Labor Standards Act of 1938, as amended, to the Wage and Hour Administrator, may bring an action in her own name for injunctive relief under Section 15(a)(3) of the Act, declaring such discharge unlawful, if pursuant to Rule 19(a) of the Federal Rules of Civil Procedure, providing for joinder of necessary parties, the Secretary of Labor was joined as a defendant, and has submitted to the jurisdiction of the Court by filing an Answer. An

alternative question is presented as to whether mandamus or a mandatory injunction will issue to join the Secretary of Labor as an involuntary plaintiff under Rule 19(a) *supra*, solely for procedural purposes, upon a showing of arbitrary and capricious evasion of duty in declining to act upon admitted evidence of a prima facie case.

STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes are:

Fair Labor Standards Act of 1938, as amended, 29 U.S.C.A. 201 *et seq.*, 52 Stat. 1060; as amended by 53 Stat. 1266; by Reorganization Plan No. 2 (60 Stat. 1095) effective July 16, 1946; . . . by the Fair Labor Standards Amendments of 1949 (63 Stat. 917); by Reorganization Plan No. 6 of 1950 (64 Stat. 1263); by the Fair Labor Standards Amendments of 1955 (69 Stat. 711):

Investigations, Inspections, Records, and Homework Regulations

Sec. 11(a) The Secretary of Labor or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this Act . . . Except as provided in section 12 and in subsection (b) of this section, the Secretary shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 12, the Secretary shall bring all actions under section 17 to restrain violations of this Act.

. . .

Prohibited Acts

Sec. 15(a) . . . it shall be unlawful for any person—

. . .

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this act, or has testified or is about to testify in any such proceeding . . .

. . .

Injunction Proceedings

Sec. 17. The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 15: *Provided,* That no court shall have jurisdiction, in any action brought by the Secretary of Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action.

The pertinent Rules are:

Revised Rules of the Supreme Court of the United States effective July 1, 1954:

Rule 19. Considerations Governing Review on Certiorari

1. (b) Where a court of appeals has . . . decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court . . .

Federal Rules of Civil Procedure for the United States District Courts, with amendments to August 1, 1957:

Rule 19(a). Necessary Joinder

Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

STATEMENT OF THE CASE

Civil action was brought by petitioner in the United States District Court for the District of Columbia for reinstatement to employment with the Washington Post Company under the Fair Labor Standards Act of 1938, as amended, 52 Stat. 1068, 29 U.S.C.A. Sec. 201 *et seq.*, for discharge in violation of Section 15(a)(3) of the Act. (p. 3). The facts averred in the Complaint, which must be admitted for consideration of dismissal or summary judgment, are set forth in greater detail in the Record, in the Complaint (R-JA-2) and plaintiff's affidavit (R-JA 13).

The Secretary of Labor was joined for procedural purposes under Rule 19(a) of the Federal Rules of Civil Procedure. (p. 5). The United States District Court granted the Washington Post Company's Motion to Dismiss and the Motion of the Secretary of Labor for Summary Judgment, and denied plaintiff's motions, by order entered October 21, 1958. (App. 1a, 3a).

The judgment of the District Court was affirmed on appeal by the United States Court of Appeals for the District of Columbia Circuit (No. 14823), decided April 23, 1959. (App. 4a, 6a).

The grounds stated for the decision were that injunction actions under Section 17 of the Fair Labor Standards Act (p. 4) are reserved exclusively to the Secretary of Labor, that his discretion is absolute, even in the face of evidence that it is exercised in an arbitrary and capricious manner, and that under the statute employees are without recourse for violations other than unpaid minimum wage and overtime compensation.

ARGUMENT FOR GRANTING THE WRIT

I.

The Court Below Has Decided an Important Question of the Interpretation of the Fair Labor Standards Act Which Has Not Been Settled by This Court.

During oral argument (unreported) in the United States Court of Appeals for the District of Columbia Circuit, questioning by the Court clearly established the positions of the appellees to be that the Secretary of Labor was empowered by Section 11(a) of the Fair Labor Standards Act (p. 3) to make arbitrary and capricious decisions totally unfounded in fact or reason, and that no procedure is available to an employee to seek recourse in the courts to procure the enforcement of the law.

Petitioner contends that no such power may be inferred from the wording of the Act. The clear meaning of the controversial clause in Section 11(a) is that it relates to actions in discovery, inspection and production of records, which are properly limited to the Secretary of Labor to protect confidential material from unreasonable search. Insofar as the restriction relates to this type of action, it is logical. The intent is clear from the exceptions cited in the clause, which

provide other means of discovery to investigations through State agencies and under the Child Labor provisions.

The essential purpose of the Fair Labor Standards Act is the protection of the rights of employees. Authority vested in the Secretary of Labor to enforce the Act is a public trust to effect that purpose. It presupposes the interest of the Secretary is in protection of the employee, and his authority is predicated upon that interest. Further, Rule 17(a) of the Federal Rules of Civil Procedure provides:

> Every action shall be prosecuted in the name of the real party in interest . . . a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States.

The rule was not intended to defeat the purposes of a law by barring the beneficiary from legal remedies. In the hearings before the Committee on Education and Labor, House of Representatives, 21st Congress, First Session, on HR 2033, Volume 1, pp. 114-115, on the Amendments to the Fair Labor Standards Act William R. McComb, Wage and Hour Administrator; testified

> . . . I would like to make a statement, because it has not been questioned, and I think something should be said. That is the request here for the right of the Secretary to sue. We have had many employees to ask us to sue. They are reluctant, as we all are, unless we are lawyers, to get into Court. They do not want to go in—they do not

want to get involved. They say: "Why don't you sue for me?"

In *A.T.A.* v. *U.S.*, 60 S. Ct. 1059, 84 L. Ed. 1345, 310 U.S. 534 at 542, Mr. Justice Reed, in stating the relative powers of the Interstate Commerce Commission and of the Wage and Hour Division of the Department of Labor over the question presented by that case ruled:

> In the interpretation of statutes, the function of the Courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. Minor v. Mechanics Bank, 1 Peters 46, 64; Pennington v. Coxe, 2 Cranch 33, 59; James v. Milwaukee, 16 Wall 159, 161; Atkins v. Disintegrating Co., 18 Wall 272, 301. White v. U.S., 191 U.S. 545. Oxawa v. U.S., 260 U.S. 178, 194; U.S. v. Stone & Downer Co., 274 U.S. 225, 239; Gulf State Steel Co. v. U.S., 287 U.S. 32, 45; Royal Indemnity Co. v. American Bond & M. Co., 289 U.S. 165, 169; Lincoln v. Ricketts, 297 U.S. 373, 376; Foster v. U.S. 303 U.S. 118, 120.

It would be distortion of the plain meaning and purpose of the Fair Labor Standards Act to lift a single phrase from Section 11(a) (p. 3) and transpose it several pages away and out of context to read as though it were part of Section 17. Yet this was what was done in the Third Circuit in 1943 in the case of *Bowe* v. *Judson C. Burns*, 137 F. 2d 37, and in the Second Circuit in *Roberg* v. *Henry Phipps Estate*, 156 F. 2d 958, in 1946, which have been cited ever since as precedent that employers can flaunt the provisions of Section 15(a)(3) with impunity.

The occasional victim of unlawful discharge is almost always a person unskilled in the technical in-

tricacies of legislative interpretation and judicial decision, and so is helpless in the face of adverse decisions. Further, the infrequency of this violation as compared to the more fully defined minimum wage and overtime provisions of the Act tends to abandonment of these cases when confronted by opposition and lack of cooperation from the Labor Department.

The Secretary of Labor has himself exercised the authority in a closely parallel case, *Mitchell* v. *Equitable Insurance Company*, 13 W.H. Cases 564. A favorable decision was rendered for the Secretary in an action for reinstatement of an employee wrongfully discharged in violation of Section 15(a)(3) of the Fair Labor Standards Act in the District Court of Camden, New Jersey, in an opinion which stated:

> The interpretation that counsel would ask the court to place upon the Act would be that if the employees would tell the administrator the truth in the investigation, even though the company is not subsequently found to be engaged in interstate commerce, just because they have cooperated with an agency of the government, and for that alone, the employer can fire them.
>
> Congress has seen fit to adopt wording in this Act that has been described by the court of appeals in this circuit in the Judson C. Burns case, 157 F. 2d 37, as being clear and explicit. The Act says "any employee". It specifically does not extend the protection of this Act to employees covered under the Act. It prevents the discharge or discrimination by any employer against any employee who has testified or is about to testify. . . .
>
> These provisions of the Act, Sections 6 and 7, relating to wages and to hours, do apply only to employees. The prohibition expressed in Section 15, however, are applicable "to any person". See-

> tion 15(a)(3) [the very one we are dealing with here] makes it unlawful for "any person", an employer, to discharge an employee, and for "any person", "whether or not he is an employer, to discriminate against an employee," and so on.
>
> It would seem to the Court that it is well within the legal ability of Congress to provide that no one can discriminate against any employee or any person because they have given a statement to a federal agency in the realm of something that the federal agency is entitled to investigate, regardless of the outcome of the investigation.
>
> . . . I conclude as a matter of law that the Court has authority to order her reinstatement together with back pay to which she is entitled under the Act.

The Secretary of Labor can not logically reverse his own positions in this case, upheld by a decision of the Court.

Section 17 provides for actions for injunctions without specifying either the parties or the sections of the Act to which it applies, as does Section 16, but designating the District Courts as the proper forum. 29 U.S.C.A. 217. (p. 4) Section 17, like Section 16, specifies waiver of liquidated damages in actions brought by the Secretary.

No decision of this Court has been cited as authority that Section 11(a) restricts the equitable remedy of injunction to the Secretary. Two decisions of this Court cited in the briefs and arguments in the courts below define the remedies available under the Fair Labor Standards Act, but do not cite the phrase in Section 11(a) as a limitation on the injunctive remedy. *Robertson* v. *Argus Hosiery Mills*, 121 Fed. 2d 285

(1941), 62 S. Ct. 181, 314 U.S. 681, 86 L. Ed. 544; *Mitchell* v. *Lublin, McGaughy & Associates, et al.*, 79 S. Ct. 260. But perhaps the most convincing authority are the numerous actions that have been brought by employers to restrain enforcement of the Act, on the ground of exemption, in which no claim under the phrase in Section 11(a) was made as a defense. In the cases of *Rogers* v. *B & B Vending Co.*, 250 Fed. 2d. 120 (5th Cir. 1957) and *Rogers* v. *Skinner*, 201 Fed. 2d 521 (5th Cir. 1953), the actions were dismissed, not because Section 11(a) excludes actions not brought by the Secretary, but because the Secretary had not been made a party. In the instant case the Secretary was joined under Rule 19(a).

II.

The Court Below Has So Far Departed From Established Procedures in Granting Dismissal and Summary Judgment Without Opportunity to Submit Evidence as to the Averments of the Complaint as to Justify Reversal by This Court.

Petitioner respectfully submits that the logic of the opinion of the Court below is defective in several particulars.

In reciting the underlying facts, the Court has failed to evaluate the evidential worth of the affidavits. The affidavit of Mr. Hennessey, the investigator (R-JA 12) shows only that he investigated wage and hour violations as to the petitioner, but does not show that he did discover wage and hour violations by other employees, a point significant for the purpose of this action insofar as it rebuts the inference that petitioner's complaints were made frivolously and in bad faith. It disregards both the averments of the Complaint (R-JA 2) and plaintiff's affidavit (R-JA 13).

The investigator's affidavit, upon which the Court below relies, accepts without scrutiny the Washington Post Company's allegation that petitioner's employment was terminated as a result of abolition of her job. The Court below disregards plaintiff's affidavit referring to numerous documents admitted as genuine in the original file showing circumstantial evidence clearly supporting the Complaint.

It seems significant to petitioner that it is well settled law that upon motion for dismissal or for summary judgment all the allegations of the complaint must be admitted as stated, and that all questions of fact must be resolved in the plaintiff's favor. This rule has been clearly and logically stated by this Court in *U. S.* v. *Employing Plasters' Association of Chicago*, 74 S. Ct. 452, 347 U.S. 186, at 189, L. Ed. 618 (1954):

> . . . And where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified.

Similarly, the earlier cases of *Asher* v. *Ruppa*, 173 F. 2d 10 (7 Cir. 1949), at 12, quoting numerous precedents, held:

> . . . upon a motion of this sort the complaint must be construed most favorably to the plaintiff, with doubts resolved in his favor and the allegations accepted as true. The complaint should not be dismissed if it can reasonably be conceived that the plaintiff may be entitled to some relief.

In the decision in *Patrick* v. *Esso Oil Company*, U.S. Dist. Ct. N. J., decided November 1, 1957, 156 F. Supp. 336, in which an action was brought for discharge of an employee, the Court stated:

> A complaint is not subject to dismissal unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.

Other cases to the same effect include *Carroll* v. *Morrison Hotel Corp.*, 149 F. 2d 404, 408 (7 Cir. 1945); *Young* v. *Hicks*, 250 F. 2d 80.

The fact that the Court below was mislead by the ambiguity of the affidavit of the investigator indicates the necessity of a trial on the merits, with the opportunity for cross-examination to adduce evidence evaded by respondents.

III.

The Decision of the Court Below is in Conflict With Pertinent Decisions of This Court in Refusing to Issue Mandamus or a Mandatory Injunction to the Secretary of Labor Upon Showing of Arbitrary and Capricious Evasion of a Procedural Duty.

It seems quite evident that the duties and powers delegated to the Secretary of Labor under the Fair Labor Standards Act are statutory obligations that may not be capriciously avoided at the whim of a subordinate or arbitrarily set aside without due consideration in good faith of the merits of the case. Immunity of the Government from suits without its consent is immunity of the authority inherent in the office, not of the human errors and miscarriages of administration. The question whether mandamus would issue to a cabinet officer was settled by this Court as far back as Chief Justice Marshall's time in *Marbury* v. *Madison*, 1 Cranch 137:

> Where the matter is peradventure clear, where the agency is clearly derelict in failing to act, where

the inaction or action turns on a mistake of law, then judicial relief is often available.

It is contended that appellant seeks to compel the exercise of discretion vested solely in the Secretary. But the Secretary is not instituting the suit. He is merely joined as a necessary and interested, but inactive party. It remains in his discretion to decide whether he will give the plaintiff positive assistance, as he has made a gesture of doing by making the investigation. He may, in his discretion, remain inactive, leaving the whole burden of proof upon appellant.

The Secretary of Labor has in effect consented to joinder under Rule 19(a) of the Federal Rules of Civil Precedure (p. 5). The Memorandum of Points and Authorities in Opposition to Plaintiff's Motion to Join the Secretary, filed August 11, 1958, on page one, states:

> James P. Mitchell, Secretary of Labor, is already named as a defendant in this action by the plaintiff, and the jurisdiction of this Court over his person is not contested. Service of process has been made upon him. To have him also become a plaintiff herein would put him in what would be at best an anomalous situation.
>
> . . .
>
> Since James P. Mitchell is already a party to the action, there is no need for the action sought by the present motion. The provision of Rule 19(a) respecting an involuntary plaintiff exists for the purpose of allowing a person to be made a party whose presence is necessary if the rights of those already parties are to be fully adjudicated, and who can not be made a party defendant due to lack of the Court's jurisdiction over his person.

Since the Secretary, by his own statement, acknowledges joinder as defendant to be sufficient, for the purposes of Rule 19(a), and admits that it is not contested, it can not be logically stated that it is a suit against the Secretary as an agent of the Government without its consent.

But if joinder of the Secretary of Labor under Rule 19(a) is held not to give effect to the right to enforcement of the Fair Labor Standards Act, then petitioner is entitled to seek the assistance of the Courts through mandamus or a mandatory injunction, for the purely ministerial duty of permitting the Secretary's name to be joined for procedural purposes, so that the legislative policy may not be thwarted. See *Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697 (1945); *Chapman, Secretary of the Interior* v. *El Paso Natural Gas Co.*, 204 Fed. 2d at 46; *Chapman, Secretary of the Interior, et al.* v. *Santa Fe Pacific Railroad Co. et al.*; U.S. Ct. App. D.C. Cir. 1952, 72 S. Ct. 1036.

CONCLUSION

WHEREFORE, it is respectfully submitted that petition for writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

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APPENDIX

(Filed October 1, 1958)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1351-58

DIANA K. POWELL, *Plaintiff*

v.

THE WASHINGTON POST COMPANY and

JAMES P. MITCHELL, Secretary of Labor for the United States, *Defendants*

Memorandum

The plaintiff, Diana K. Powell, was employed by the defendant, The Washington Post Company, as a part-time clerk until April 1958. In her complaint she alleged that The Washington Post Company discriminated against her and discharged her, in violation of Section 15(a)(3) of the Fair Labor Standards Act, 29 U.S.C.A. 215. She demands that The Washington Post Company reinstate her in adequate and suitable employment and to pay her such compensation from the time unemployed as this Court may deem just and proper.

Section 15(a) of the Fair Labor Standards Act provides that:

> "It shall be unlawful for any person * * * to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to his Act, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee."

A willful violation of this Section subjects the offender to a criminal penalty under Section 16(a) of the Act. Jurisdiction to restrain violations of Section 15 is con-

ferred upon the District Courts by Section 17 of the Act. This Section reads as follows:

> "The district courts • • • shall have jurisdiction, for cause shown, to restrain violations of section 15: Provided, That no court shall have jurisdiction, in any action brought by the Administrator to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an additional equal amount as liquidated damages in such action."

Section 11(a) of the Act provides, in part, as follows:

> "Except as provided in Section 12, the Administrator shall bring all actions under Section 17 to restrain violations of this Act."

The authority of the Administrator was transferred to the Secretary of Labor in May 1950 under their Reorganization Plan No. 6. In this case the Secretary of Labor has not brought such an action. There is no language in the Statute which can be construed as compelling the Secretary of Labor to file suit whenever an allegation of a violation is received by the Department. The authority of the Secretary of Labor is exclusive and this Court has no jurisdiction of a suit brought by an employee who alleges that such was discriminately discharged in violation of Section 15(a)(3) and demands reinstatement. The Fair Labor Standards Act makes no provision for a civil action by an employee allegedly discriminately discharged in violation of Section 15(a)(3) of the Act to recover damages for such discharge. For these reasons the motion of the Washington Post Company to dismiss the action for lack of jurisdiction is granted and the motion for summary judgment for the plaintiff is denied; the motion to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff and for judgment on the pleadings is denied; and the motion for summary judgment as to defendant James P. Mitchell is granted. Counsel for the defendants will prepare the proper order.

EDWARD M. CURRAN /s/
Judge

(Filed October 21, 1958)

Order

The defendant, The Washington Post Company, having filed a motion to dismiss as to the defendant, The Washington Post Company, for lack of jurisdiction and failure to state a claim upon which relief can be granted, and the plaintiff, Diana K. Powell, having filed a motion for summary judgment as to defendant, The Washington Post Company, and a motion to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff and for judgment on the pleadings and the defendant, James P. Mitchell, Secretary of Labor, having filed a motion for summary judgment as to the defendant, James P. Mitchell, Secretary of Labor, and the Court having considered memoranda filed by all parties with respect to such motions and having heard oral argument thereon, it is this 21st day of October, 1958,

ORDERED, that the motion of the defendant, The Washington Post Company, to dismiss as to the defendant, The Washington Post Company, for lack of jurisdiction and for failure to state a claim upon which relief can be granted be and it is hereby granted; that the motion of the plaintiff, Diana K. Powell, for summary judgment as to the defendant, The Washington Post Company, be and it is hereby denied; that the motion of the plaintiff, Diana K. Powell, to join James P. Mitchell, Secretary of Labor, as an involuntary plaintiff and for judgment on the pleadings be and it is hereby denied; and that the motion of James P. Mitchell, Secretary of Labor, for summary judgment as to the defendant, James P. Mitchell, Secretary of Labor, be and it is hereby granted.

EDWARD M. CURRAN /s/.
Judge.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14823

DIANA K. POWELL, APPELLANT

v.

THE WASHINGTON POST COMPANY and JAMES P. MITCHELL, Secretary of Labor, APPELLEES

Appeal from the United States District Court for the District of Columbia

Decided April 23, 1959

Miss Diana K. Powell, appellant *pro se*.

Mr. George Blow, with whom *Mr. James C. McKay* was on the brief, for appellee The Washington Post Company.

Mr. Jack Marshall Stark, Assistant United States Attorney, with whom *Mr. Oliver Gasch*, United States Attorney, and *Mr. Carl W. Belcher*, Assistant United States Attorney, were on the brief, for appellee James P. Mitchell, Secretary of Labor. *Mr. Walter J. Bonner*, Assistant United States Attorney, also entered an appearance for appellee James P. Mitchell, Secretary of Labor.

Before PRETTYMAN, Chief Judge, and FAHY and BURGER, Circuit Judges.

PER CURIAM: This is a civil action brought by our appellant, Diana K. Powell. She alleged she had been employed as a part-time clerk by The Washington Post Company; she several times notified responsible officers of the Company that clerks in its employ were working in violation of the Fair Labor Standards Act; and, when the Company was informed of her intention to submit the matter to the Department of Labor, she was dis-

charged. She alleged this discharge was in violation of Section 15(a)(3) of the Act.[1] She prayed that the Company be required to reinstate her in adequate suitable employment and pay her compensation for the time she was unemployed, that the defendant Secretary of Labor be required to investigate the conditions described in her complaint, and that he take such further action as might be necessary to restrain continued violations of the Act. The Washington Post Company moved to dismiss, and the Secretary filed an answer and a motion for judgment on the pleadings and then a motion for summary judgment. Attached to the latter motion was an affidavit of an official of the Department of Labor, showing he had made an investigation of the operations of the Company and had been unable to find any evidence of violation of the statute. An affidavit filed by the plaintiff verified the fact that such an investigation had been made. The District Court dismissed as to The Washington Post Company and granted the Secretary's motion for summary judgment.

Section 11(a) of the Fair Labor Standards Act[2] provides in part: "Except as provided in section 12, the Secretary of Labor shall bring all actions under section 17 to restrain violations of this Act." In so far as plaintiff's prayer relates to action by the Secretary to restrain violations, the answer is that the appeal is to his discretion, as the quoted provision of the statute makes clear. In so far as she prayed that the Secretary be required to investigate, the answer is undisputed that such an investigation was made. In so far as The Washington Post Company is concerned, the Fair Labor Standards Act makes no provision for a civil action by an employee to recover damages for discharge in violation of the Act

[1] 52 STAT. 1068 (1938), 29 U.S.C.A. § 215(a)(3).

[2] 52 STAT. 1066 (1938) as amended, 29 U.S.C.A. § 211(a).

on for reinstatement. The statute does provide[3] that employees may recover in a civil action unpaid minimum wages or unpaid overtime compensation, plus an additional equal amount as liquidated damages. But our appellant did not claim unpaid minimum wages or unpaid overtime compensation.

The judgment of the District Court must be and is affirmed.[4]

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,823

SEPTEMBER TERM, 1958

C. A. 1351-58

DIANA K. POWELL, APPELLANT,

v.

THE WASHINGTON POST COMPANY and JAMES P. MITCHELL, Secretary of Labor, APPELLEES.

Appeal from the United States District Court for the District of Columbia

Before: PRETTYMAN, Chief Judge, and FAHY and BURGER, Circuit Judges.

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

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[3] 52 STAT. 1069 (1938), as amended, 29 U.S.C.A. § 216(b).

[4] *Compare* Bowe v. Judson C. Burns, 137 F.2d 37 (3d Cir. 1943); Roberg v. Henry Phipps Estate, 156 F.2d 958 (2d Cir. 1946).

On Consideration Whereof It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further Ordered by the Court that appellee The Washington Post Company recover from appellant its taxable costs on this appeal and have execution therefor.

Per Curiam.

Dated: April 23, 1959